1999

Dennis L. Mitchell and Janet Robins Mitchell v. Harrington Trucking, Inc : Reply Brief

Utah Court of Appeals

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IN THE UTAH APPELLATE COURT

In re: The Marriage of:	:	
DENNIS L. MITCHELL and JANET ROBINS MITCHELL,	:	No. 990187-CA
Appellee,	:	Priority No. 15
HARRINGTON TRUCKING, INC.,	:	Civil No. 984901224
Defendant in Intervention and Appellant.	:	Judge Anne M. Stirba

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DENIAL OF APPELLANT HARRINGTON TRUCKING'S MOTION TO SET ASIDE DEFAULT JUDGMENT.

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POINT I.

APPELLEE'S STATEMENT OF THE CASE AND STATEMENT OF FACTS CONTAINS ERRONEOUS FACTUAL ASSERTIONS.

The appellee does not challenge the appellant, Harrington Trucking's, statement of the case or statement of facts in her brief. However, appellee proffers her own statement of the case and statement of the facts which contains substantial and relevant erroneous assertions. What follows is Harrington Trucking's response and correction of appellee's erroneous factual assertions.

1. On pages 3 and 4 of her brief, appellee states that "that at the September 18, 1998, [sic] hearing on those matters, Harrington acknowledged that it had not filed an answer." This assertion is not supported by the record. The September 18, 1998 hearing contains no reference by any party, including counsel for Harrington Trucking, to the answer filed on April 7, 1998. (R. 294, pp. 1-30.) Therefore, counsel for

Harrington Trucking did not "acknowledge" that it had failed to file an answer.

2. On page 4 of her brief, appellee asserts that "Harrington conducted no formal discovery in this case." Again, Harrington's statement is directly controverted by the record in this case. Attached to Harrington's reply memorandum in support of its motion to set aside default judgment or declaration of common law marriage, Harrington Trucking attached several exhibits which included subpoenas it had issued as well as letters in an attempt to conduct informal discovery through appellee's counsel. (R. 160-235.) Therefore, the record clearly shows that Harrington Trucking conducted both formal and informal discovery in an attempt to resolve this matter despite appellee's assertions to the contrary. (Id.)

3. Nowhere in appellee's statement of the case does she mention that Harrington Trucking's motion to set aside the default judgment was initially granted by Commissioner Arnett who was familiar with the case. The same day the Commissioner

granted Harrington Trucking's motion to set aside the default judgment, Judge Maughan, who was sitting on the case for the first time, overruled the Commissioner's report and recommendation. Judge Maughan simply did not have the time to become familiar with the facts of the case in order to make a proper ruling.

4. On page 6 of appellee's brief at paragraph 4, appellee asserts that "no answer controverting the allegations of [appellee's] petition was ever filed." This statement of "fact" is the main issue in this case was before this Court and therefore cannot be a fact. It is for this Court to decide whether or not any answer was filed on April 7, 1998 which precluded the court from entering a default judgment in this matter.

5. On pages 6 and 7 of appellee's brief at paragraph 9, appellee fails to quote the entire text of Harrington Trucking's answer filed on April 7, 1998. The entire text of the answer is as follows:

> COMES NOW Harrington Trucking and objects to the petition for judicial declaration of common law marriage filed in this matter by Janet Robins Mitchell.
>
> The basis for this objection is found in the motion to intervene and the accompanying memoranda filed by movant Harrington Trucking and upon the basis that the facts and affidavits submitted by petitioner are insufficient to satisfy the requirements of Utah Code Annot. § 31-1-4.5.

(R. 55-57.) (Emphasis added. Underlined portions were not quoted by appellee.)

6. On page 7 of appellee's brief at paragraph 10, appellee asserts that "neither the intervention memorandum nor the objection contest any allegation of [appellee's] petition." Again, this is not what the record reflects. (R. 55-90.) The objection was in the form of a general denial as specifically allowed under Rule 8(b) of the Utah Rules of Civil Procedure. Harrington Trucking objected to all of appellee's allegations in her petition. (Id.)

7. On page 7, paragraph 12, appellee's counsel argues that he was unaware of any answer being on file at the

September 18, 1998 hearing and therefore an answer was necessary in order to put him on notice of what claims would be contested by Harrington Trucking. However, appellee's counsel's ignorance of the general objection filed on April 17, 1998 is irrelevant to this case. The answer containing a general objection was on file. Harrington Trucking challenged all of the allegations in appellee's petition on April 7, 1998. (R. 55-57.) Even if appellee's counsel did not know about the answer, an answer was on file. That is all that is required under the Utah Rules of Civil Procedure.

8 On page 9 of appellee's brief at paragraph 23, appellee asserts that "even though earlier dates were available, Harrington Trucking scheduled its motion to set aside for hearing on December 16, 1998." This statement of fact is misleading because the record reflects Harrington Trucking's counsel did every thing in his power to expedite a hearing date on this issue. The records states as follows:

> I'd like to back up a little bit and talk about what happened when we filed our motion to set aside. I personally brought

> that motion here to the court. I personally filed it with the clerk. I personally took copies and brought them to Judge Stirba. Judge Stirba, at that time, had already left due to her incapacity. I talked to her clerk. Her clerk informed me that it was being sent down to Commissioner Arnett. I said, Why, you know, shouldn't this be heard before a Judge? She said, No, I believe this should go down to Commissioner Arnett. He has the file, I don't have it anymore, you can't give me anything.
>
> I walked to Commissioner Arnett's office. I filed a courtesy copy with Commissioner Arnett of the motion to set aside default. I looked at his calendar. Initially, there was a date on December 4th of this year, but that was the first one. So, again, that's after November 12th. However, there was scheduling difficulty and I had to click it back to December 16th. But, again, I did it as soon as I could because I realized that we needed to get this resolved as soon as possible. I was not - and I can say this based on my own personal knowledge of what I actually did. I did it as quickly as I could.

(R. 294, pp. 19-20.)

9. On page 10, paragraph 25, appellee states, "Harrington does not argue that the lower court's finding of

prejudice to [appellee] was in error." Although technically true, the statement is misleading because it presupposes that Harrington Trucking had a duty to raise the issue of prejudice in its initial brief. Harrington Trucking does not have the duty to make appellee's arguments for her. Appellee has now raised the issued of prejudice and Harrington Trucking will respond to the issue of prejudice.

POINT II.

BECAUSE THERE WAS AN ANSWER ON FILE, THE TRIAL COURT'S ENTERING OF A DEFAULT JUDGMENT WAS AB INITIO INVALID.

Appellee does not contest the fact that a responsive pleading was on file on April 7, 1998. Rather, appellee attempts to characterize this pleading as not an answer. In support of her argument, appellee cites Black's Law Dictionary and a section from Wright & Miller, Federal Practice and Procedure claiming that Utah case law on what constitutes an answer is "sparse". However, there are several Utah cases discussing the interpretation of pleadings generally and answers specifically.

The general rule regarding interpretations of pleadings like answers is embodied in Rule 8(f) of the Utah Rules of Civil Procedure which states, "All pleadings shall be construed as to do substantial justice."

Pursuant to this general principle, a great deal of case law has grown up around the proposition that pleadings like answers should be liberally construed. As early as 1932, the Utah Supreme Court held that an answer should be construed liberally and supported by every legal intendment. Escalante Co. v. Kent, 7 P.2d 276 (Utah 1932). The liberal construction rule has also been applied to complaints. In Debry v. Noble, 889 P.2d 428 (Utah 1985), the Supreme Court held that allegations in a complaint should be construed liberally. This liberal construction rule is the bedrock upon which any court should build its interpretation of an answer.

The answer filed by Harrington Trucking was in the form of a general denial. Harrington Trucking's answer filed on April 7, 1998 states in pertinent part:

> Comes now Harrington Trucking and **objects** to the petition for judicial declaration of common law marriage filed in this matter by Janet Robbins Mitchell.

(R. 55-57.)

General denials of this form are specifically allowed by the Utah Rules of Civil Procedure. Rule 8(b) of the Utah Rules of Civil Procedure states in pertinent part:

> A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which they adverse party relies. ... He may make his denials as specific denials of designated averments or paragraphs or **he may generally deny all the averments**. (Emphasis added.)

In the case of Jones, Waldo, Holbrook & McDonough v. Dawson, 923 P.2d 1366, 1374 (Utah 1996), the Utah Supreme Court discussed at length the rules applicable to general denials. The Supreme Court stated:

> Under modern pleading rules, the scope of a general denial is very broad. We held in *Cheney v. Rucker*, 14 Utah 2d 205, 211, 381 P.2d 86, 91 (1963), and have reiterated on numerous occasions since that although rule 8(c) is valuable for assuring that the issues to be tried clearly framed, it is

> not the only rule in the book of Rules of Civil Procedure. They must all be looked to in light of their even more fundamental purpose of liberalizing both pleading and procedure to the end that the parties are afforded the privilege of presenting whatever legitimate contentions they have pertaining to their dispute.
>
> Thus our interpretation of the pleading rules must turn upon the fact that "[w]hat [the parties] are entitled to is notice of the issues raised and an opportunity to meet them." When this is accomplished, that is all that is required.

Therefore, the issue is whether the answer was adequate to put appellee on notice of the parts of her petition which would be contested by Harrington Trucking. The general denial clearly indicates that all of appellee's contentions contained in her petition may have been challenged by Harrington Trucking. This put appellee on notice that she needed to prepare to prove all of her claims in her petition. That is all that is required under the law.

A. Even Assuming that the Objection is Construed as a 12(b)(6) Motion, the Trial Court Could Not Enter Default Under the Rules; Therefore, Harrington Trucking's Motion to Set Aside the Default Judgment Should Have Been Granted.

Appellee argues that the answer filed on April 7,1998 should be construed as a Rule 12(b)(6) motion. Therefore, she reasons, the entry of default judgment was really a denial of the Rule 12(b)(6) motion. Appellee then takes a final leap beyond reason and states that default was properly entered.

This argument is without merit. Appellee ignores the requirement of proper notice and hearing on the alleged Rule 12(b)(6) motion. However, even ignoring these obvious problems with appellee's arguments, the Utah Rules of Civil Procedure clearly indicated that even if the entry of default judgment were a denial of the alleged 12(b)(6) motion, Harrington Trucking would have had ten days to file an answer. Rule 12(a)(1) of the Utah Rules of Civil Procedure states:

> If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within **ten days** after notice of the court's action. (Emphasis added.)

In this case, the trial court entered default judgment on October 28, 1998. Even assuming that Harrington Trucking received notice that same day, Harrington Trucking would have ten days to file an answer. Even appellee admits that Harrington Trucking did in fact file an additional answer on October 28, 1998, well within the ten-day required period to file an answer following the denial of a motion to dismiss.

Therefore, under any set of circumstances (either an answer was on file, or the answer was really a 12(b)(6) motion which was denied on October 28, 1998, followed by the filing of a second answer on the same day), appellee's arguments fail as a matter of law. Under either set of circumstances, there was an appropriate answer on file. Therefore, under Rule 55 of the Utah Rules of Civil Procedure, the trial court could not enter a default judgment. Because the trial court could not enter a default judgment, the trial court erred, as a matter of law, by failing to set aside the default judgment at a later date when given the opportunity to do so.

POINT III.

ANY PREJUDICE TO APPELLEE IN THIS CASE WAS DUE TO APPELLEE'S DECISION TO FILE A MERITLESS DEFAULT CERTIFICATE AND NOT TO ANY ACTION OF HARRINGTON TRUCKING.

Appellee argues that she has been "prejudiced" by the actions of Harrington Trucking. However, it is not the actions of Harrington Trucking which have caused her prejudice, if any, but rather her decision to pursue a meritless default judgment.

On October 28, 1998, appellee was presented with a choice. She could either go ahead and have an evidentiary hearing on her petition for common law marriage which was scheduled to be heard on November 12, 1998, or she could attempt to avoid a hearing on the merits by filing a default certificate. She knew or should have known that the latter course would be risky in that a responsive pleading was on file since April 7, 1998. However, for reasons unknown, appellee decided to gamble on the latter course instead of having a trial on the merits. It is unclear why appellee

wished to avoid a trial on the merits, but she attempted to use a procedural argument to avoid a determination on the merits.

If, in the end, her strategy results in damage to her claim, she can certainly not blame Harrington Trucking. Harrington Trucking acted in good faith to complete discovery in time for the evidentiary hearing. To now claim "prejudice" due to her tactical decision is difficult to understand. Appellee could have avoided this problem by simply going forward with the evidentiary hearing. She choose not to do so and instead chose a risky path. When a party harms its own case by its own actions, it cannot claim prejudice due to those actions. See, Adams v. Board of Review of Industrial Commission, 821 P.2d 1, 7 (Utah App. 1991) (holding that when considering an error that is strictly of one party's making, the other party cannot be charged for that error); Askew v. Hardman, 884 P.2d 1258, 1264 (Utah App. 1994)(dissenting opinion) (when the dilemma is largely of one party's making, the other party should not be charged with the error.)

Harrington Trucking is not responsible for appellee's poor choices.

POINT IV.

WHETHER OR NOT AN ANSWER WAS FILED IS NOT AN ISSUE OF FACT.

Although appellee contends otherwise, whether the pleading filed on April 7, 1998 is an answer is a question of law, not of fact. Appellee concedes that there was a pleading filed on April 7, 1998. The only issue, then, is whether said pleading constitutes an answer. Since the answer is part of the record, this Court may determine for itself whether or not it was filed on April 7th and the nature of the answer. There is no issue of fact regarding this issue.

POINT V.

HARRINGTON TRUCKING CAN SEEK RELIEF UNDER RULE 60(a).

Appellee argues that Harrington Trucking's request for relief under Rule 60(a) is inappropriate because the issue is not raised below. However, appellee's argument ignores the issue that was in fact raised below.

It was is uncontroverted that Harrington Trucking requested the court to set aside the default judgment as there was in fact an answer on file in the case. Although counsel for Harrington Trucking may have inadvertently termed the relief requested as a motion to set aside default judgment under Rule 60(b) (and in fact there was a request to set aside the default judgment under the excusable neglect portion of Rule 60(b)), the actual relief sought by Harrington was relief under Rule 60(a) for a clerical mistake. Whether or not there was an answer on file when default was entered is really a clerical issue. No matter how the counsel for Harrington Trucking may have described his request, this Court will look past the description of the motion and look to the substance of the relief actually requested. In Brown v. David K. Richards & Co, 978 P.2d at 470, 477-78 (Utah App. 1999), the court stated:

> In determining the nature of a legal order or proceeding, we look to the substance of the order or proceeding, and not its title. *See, e.g., Renn v. Utah State Bd. of Pardons*, 904 P.2d 677, 681

> (Utah 1995) ("We will look to the substance of the action and the nature of the relief sought in determining the true nature of the extraordinary relief requested."); *Gillmor v. Wright*, 850 P.2d 431,433 (Utah 1993) ("On appeal, we disregard the labels attached to findings and conclusions and look to substance.").

In this case, the relief actually requested was under Rule 60(a). The relief requested was briefed and argued, therefore, it was raised below. (R. 160-235.)

Furthermore, under Rule 60(a), the Appellate Court has the ability to correct clerical mistakes. Rule 60(a) states:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. **During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.** (Emphasis added.)

Therefore, this Court has the power under Rule 60(a) of the Utah Rules of Civil Procedure to correct the error which occurred in this case, i.e., the entry of default judgment due to the trial court's oversight in failing to recognize that an answer had been filed.

POINT VI.

HARRINGTON TRUCKING HAS ESTABLISHED THAT IT HAS A MERITORIOUS DEFENSE TO THIS ACTION.

Contrary to appellee's contentions, the trial court and the Commissioner agreed that Harrington Trucking has adduced evidence which gives it a meritorious defense to this action.

This evidence was discussed in the hearing before Judge Maughan and in the briefs filed with the trial court. (R.160-235.) Besides the documentary evidence which indicates that the appellee did not have a marital relationship with Dennis Mitchell as defined under Utah Code Annot., § 30-1-4.5, there will be testimony, from some of the people whose affidavits have been submitted in this case, that appellee's and Dennis

Mitchell's relationship was not a marital relationship as defined under Utah Code Annot., § 30-1-4.5.

This is all that is necessary. It is not for this Court nor the lower court to weigh the evidence of these issues. All that is necessary is that Harrington Trucking do what it has done, i.e., present evidence that it has a meritorious defense to this action.

CONCLUSION

For the reasons stated above, and for the reasons stated in Harrington Trucking's prior brief, Harrington Trucking respectfully requests this Court to reverse Judge Maughan's decision to deny Harrington Trucking's motion to set aside default judgment, set aside the default judgment and this remand this case for further proceedings below consistent with this Court's opinion.

DATED this 15th day of October, 1999.

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, this 15th day of October, 1999, a true and correct copy of the foregoing to the following:

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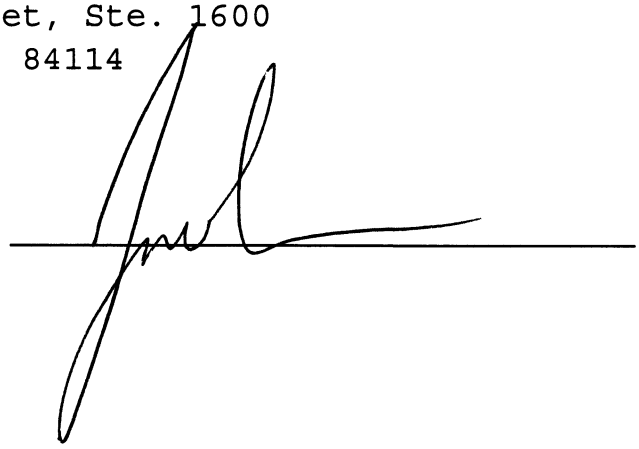

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